IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1903.

No.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PETITIONER,

vs

THE WEST COAST NAVAL STORES COMPANY, RESPONDENT.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Judicial Circuit.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner respectfully shows unto this Honorable Court, as follows:

Statement of Pleading and Proceedings.

On August 30th, 1900, the West Coast Naval Stores Company, respondent hereto, instituted an action in the United States Circuit Court for the Northern District of Florida, sitting at Pensacola, to recover against the petitioner for the cause of action hereinafter stated. The respondent relied upon two counts, the first of which is as follows:

The West Coast Naval Stores Company, a corporation under the laws, and a citizen, of the State of Florida, the plaintiff, by its attorney, John C. Avery, sues the Louisville & Nashville Railroad Company, a corporation under the laws, and a citizen, of the State of Kentucky, the defendant,

For that, to-wit: before the institution of this suit, the defendant was, in the county and state aforesaid, a common carrier of goods, wares and merchandise for hire by means of its cars drawn by locomotives over defendant's railways, and the plaintiff was then and there engaged in buying and selling, and shipping from Pensacola and other points in said county, naval stores, consisting of turpentine and

rosin, in barrels, which plaintiff conveyed to and from its yard, in said county, and warehouse in the City of Pensacola, by means of defendant's cars and locomotives, over defendant's railway, including a switch, constructed by defendants for plaintiff from defendant's main line running into the City of Pensacola, to and into plaintiff's said yard; and the plaintiff in fact avers that the course of business dealing between plaintiff and defendant, then and there, was for plaintiff to transport over said switch and defendant's railway, into the City of Pensacola, by means of defendant's cars and locomotives, plaintiff's turpentine and rosin to and upon defendant's wharf extending into the Bay of Pensacola, which wharf was and is conducted by defendant and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from said wharf, and at and upon said wharf to deliver plaintiff's turpentine and rosin to vessels, to be in and by such vessels carried to other ports in the prosecution of plaintiff's business, of which the defendant had notice; and it was the duty of the defendant, as common carrier, as aforesaid, and in the conduct of the wharf, as aforesaid, for a reasonable compensation, which plaintiff was always ready and willing to pay defendant, to give to the plaintiff the facilities aforesaid; and plaintiff further in fact avers that all of the service in fact rendered, as aforesaid, to it by the defendant, was for hire, by the plaintiff to the defendant, paid as and when required; and it was the purpose and intention of the plaintiff thereafter to continue to prosecute its business aforesaid, of which defendant had notice, and in the prosecution thereof to continue to use the facilities aforesaid as defendant well knew paying therefor reasonable and customary hire; and plaintiff had the means and ability, and had made necessary arrangements, for the further prosecution of such business, as the defendant, well knew; and the plaintiff further in fact avers that, in the midst of the prosecution of its said business, which, as plaintiff avers, was a large and lucrative business, the defendant notified plaintiff that it would not carry plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, as defendant well knew, and to which it was constantly adding, as defendant well knew, and from thence hitherto has continued to add in the prosecution of its said business, and that it, the said defendant, would refuse, and did refuse, to

transport, and from thence hitherto it has continued to refuse, to transport plaintiff's turpentine and rosin over its said railway to its said wharf, to be there loaded on certain vessels, with the managers of which plaintiff had contracted for the taking thereof from Pensacola to other ports, to which plaintiff intended to ship the same, of which defendant had notice, or to permit the plaintiff to deliver its said turpentine and rosin at said wharf to said vessels, or to permit said wharf or said railway of defendant to be used in the prosecution of plaintiff's business in so far as the same should involve the use of the said vessels in the shipment of plaintiff's said turpentine and rosin from Pensacola; by means whereof plaintiff sustained great loss and damage, to-wit: five thousand dollars ($5,000.00) for the difference between what it would have cost the plaintiff to carry the same to and load it upon the said vessels by means of defendant's railway and wharf, and what it cost to do so by other means of conveyance and delivery; and in the sum of ten thousand dollars ($10,000.00) for what it will cost plaintiff hereafter to make delivery to said vessels in excess of what it would cost to make such delivery by means of defendant's said railway and wharf; and in the sum of ten thousand dollars ($10,000.00) on account of delays, annoyances and embarrassments, resulting from being compelled to carry on its business by transporting its goods in carts drawn by mules and horses for miles by sand roads and streets, and then shipping the same out to said vessels by means of lighters, and the necessary and inevitable general immediate injury to the business of plaintiff by having to carry on its business by such rude and primitive methods side by side with modern modes and facilities, thereby losing prestige in the business community, and being forced to compete with others who have and enjoy unrestricted and unlimited use of defendant's railway and wharf facilities, as aforesaid; the plaintiff is otherwise, by reason of the actings and doings of the defendant aforesaid, greatly damaged in its business.

And plaintiff claims damages in the sum of twenty-five thousand dollars ($25,000.00,) and therefore it sues, &c.

JOHN C. AVERY,
Attorney for Plaintiff.

The second count is not set out here because it is substantially the same as the first and was so treated by the

Circuit Court of Appeals (West Coast Naval Stores Co. vs. Louisville & Nashville R. R. Co., 121 Fed. Rep. 645.) Such second count is, however, found in the Record herewith submitted, on page 5.

To these counts the petitioner interposed several pleas, among them a plea numbered three. This plea is not set out herein because it is substantially the same as a subsequent plea numbered one which is set out hereafter in full. The plea numbered three, however, is to be found in the Record on page eight.

The Circuit Court overruled a demurrer to this plea—three—and final judgment was entered against the respondent, who sued out a writ of error to the Circuit Court of Appeals of the Fifth Judicial Circuit, which decided that the Court below erred in overruling the demurrer to the said plea and reversed and remanded the cause. (West Coast Naval Stores Co. vs. Louisville & Nashville R. R. Co., 121 Fed. Rep. 645.) A copy of the decision is attached hereto as "Appendix A." After the reversal the petitioner withdrew all pleas theretofore filed and filed a new plea numbered one, which is as follows, (Rec. p. 10:)

West Coast Naval Stores Co.
vs.
Louisville & Nashville Railroad Co.

The defendant, withdrawing all former pleas, pleads to the first and second counts of the declaration as follows:

1. That, the defendant has adequate depots and yards in the City of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to, and delivery at, Pensacola. That neither its charter, nor any statutory law has compelled or required, or compels or requires it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come to and lie at said wharf to take cargo. That no business has ever been done at said wharf except the transportation by the defendant in cars on its railroad over said wharf to and from vessels lying at the said wharf, of goods brought, or to be transported, by said vessels, and the loading and unloading thereat of such vessels. That in accordance with such purpose, it made

and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, "to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company" (an agency of defendant), and making the use of said wharves "for traffic in connection with vessels other than herein referred to," "subject to special arrangement." The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to, and at the time of, the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the "certain vessels" mentioned in the declaration, and still are in force and operation. That the said "certain vessels" were not regular lines running in connection with the Louisville & Nashville Railroad, nor were they belonging to, or consigned to, Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection, and under traffic arrangements, with defendant, and such service has since been established, and a line of steamers is now regularly transporting merchandise between said points in such connection, and under such traffic arrangements; and was also in competition with the defendant itself, which was, at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the City of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile.

That the defendant has not either notified plaintiff that it would not carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores over its Railway mentioned in the declaration, to and on its wharf also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff. That the defendant has refused to permit the certain vessels mentioned in the declaration, to take goods and merchandise from its said wharf to be transported by them to the port of New York, as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant running to and from New York, and was, as aforesaid, in competition with the defendant, itself, in its rail transportation aforesaid, to and from New York City, and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf, as it gave to any and all other shippers; That the unloading by the plaintiff of its said goods into said vessels necessarily involves the lying at, attachment to, and use of the said wharf, one of the terminals of the defendant, by the said vessels; That the said wharf was not at the time mentioned in the declaration, and has never been, a public wharf, unless the facts set forth hereinbefore in this plea constituted it such.

W. A. BLOUNT,
Attorney for Defendant.

The Court sustained a demurrer to this plea and the petitioner declining to plead further, default and judgment were entered against it (p. 16 Rec.) and it sued out a writ of error to the Circuit Court of Appeals of the Fifth Judicial Circuit, which affirmed the judgment of the Court below. (See opinion Appendix B hereto.)

Grounds of this Petition.

1. That the Circuit Court of Appeals erred in the judgment against the petitioner.

2. That special reasons exist, in accordance with the decisions of this Court, why a writ of certiorari should be granted to review that erroneous judgment.

I.

The Court Below Erred.

We, of course, submit a brief herewith, in which we attempt to demonstrate the Court's error. It is only necessary, therefore, for completeness, that we state the questions at issue and the contentions of the Court below and of the petitioner.

The plea which the Court below pronounced bad presents, in connection with the count to which it is pleaded, the important question, whether a railroad company which has provided ample facilities for the delivery by it of all freight committed to it for transportation to and delivery at a city on the sea board, can, when not compelled by statute or charter, construct a wharf, place tracks thereon, connect them with its tracks leading thereto, and transport freight from such tracks to and upon said wharf for all persons alike, and still have the right to permit to come to such wharf, for the purpose of removing such freight, only such vessels as may run in regular lines in connection with it, or such as may come under special arrangements with it, and to refuse such wharf facilities to vessels which would come in competition with it, or with lines of steamers running in connection with it.

The petitioner affirms this right and the Court below denied it.

Stated a little differently, the questions were:

Whether the petitioner was, under the circumstances set out in the plea, a common carrier as to its wharf, and,

Whether one common carrier has, independent of charter or contract, the right to use the terminals of another carrier, and,

Whether a *competing* common carrier has, independent of statute or contract, the right to use the terminals of another carrier, and

Whether one common carrier has, independent of statute or contract, a right to use the wharf of another carrier.

The Circuit Court of Appeals rests its decision upon the idea that the petitioner is a common carrier, that as such it must serve all alike, that its wharf is the wharf of a common carrier and, thus, a public wharf to which all vessels have the right of access to receive freight transported by petitioner, and that it is a violation of such right to refuse to

allow vessels selected by a shipper to come to the wharf to receive freight.

These questions, as we think we shall show in our brief, were decided erroneously by the Circuit Court of Appeals.

2.

Special Grounds for this Petition.

First:

The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in cases analogous in the facts and identical in principle.

As we understand the doctrine of this Court, in its decisions, a common carrier can refuse to make traffic connections with other carriers; can "select his own agencies" for carrying out his contracts of carriage, can decline to permit the use of its terminals to other carriers, and, no matter what may be its duties to the public generally, can refuse to afford equal facilities to all other common carriers.

A. T. & S. F. R. R. Co. vs. Denver & N. O. &c., 110 U. S. 607;

Express Cases, U. S. 124;

C. St. L. & N. O. Ry. Co. vs. Pullman Car Co. 139 U. S. 79;

Tex. & Pac. Ry. Co. vs. Interstate Commerce Commission, 162 U. S. 197.

We think that we demonstrate in our brief the violation, by the Circuit Court of Appeals, of the principles embodied in these cases.

Second:

The decision of the Court below is contrary to the decisions of other U. S. Circuit Courts of Appeals and U. S. Circuit Courts in other circuits,

which announce and apply the principles enunciated in the decisions of this Court.

(C. C. A. 8th Circuit)—Little Rock &c. vs. St. Louis &c. Ry. Co. 61 Fed. 775–781;

(C. C. A. 9th Ct.)—Ilwaca Navigation Co. vs. Oregon Short Line &c. 57 Fed. 673;

Justice Jackson—Ky. & I. Bridge Co. vs L. & N. R. R. Co. 37 Fed. 567–628;
Justice Field—Oregon Short Line vs. Northern Pac. R. R. Co. 51 Fed. 465—475;
Judge Williams—Little Rock & M. R. R. Co. vs. St. Louis &c. 59 Fed. 404;
Judge Phillips—St. Louis Drayage Co. vs. L. & N. R. R. Co. 65 Fed. 39.

We think, also, that our brief demonstrates the inconsistency of the holding of the Court below with these cases.

Third:

The decision of the Court below was also in conflict with the decisions of the English Courts and the highest State Courts of Appeal

of this country, in that it ignored the right of a carrier, in the absence of statute or charter requirements, to assume the obligations of a common carrier as to such commodities and such businesses as it may see fit, and to discriminate between other common carriers in the use of its terminal facilities. The authorities are too numerous to set forth here, but many of them are to be found in our brief.

Fourth:

The question involved is of national importance

in the sense that it vitally concerns the largest businesses in the country and in every section of the union. Not only does the general question, as to the control by railroad companies of their terminals, affect such companies, but the specific question, as to the control by such companies of their wharves projecting into navigable waters is of the greatest moment not only to them, but to the business public. Such wharves exist upon the shores of the Oceans, the Gulf, the lakes and the large rivers of the country and burdens upon their free use by a railroad carrier, according to the necessities of its business, is harmful in the highest degree both to the carrier and to the shipper over its line. Unless the carrier can reserve its wharf for the connecting carriers selected by it, the certainty and regularity of the shipment of cargoes is destroyed, the inducement to inaugurate and maintain lines of vessels conveying shipments is absent, and that large commerce of the country which is

dependent upon the use of wharves, languishes and dies. The necessity for freedom to the carrier of determination as to what vessels or lines of vessels shall use its wharves is considered at length in our brief.

Fifth:

The question involved is of international importance

in the sense that all the foreign export and import business of the country is done from wharves. If the effect of compelling a railroad carrier to permit the use of its wharf terminals by any vessel desiring to use them, will be to hamper, delay and render more expensive and hazardous the shipment and receipt of goods, and to hinder or prevent the establishment and maintenance of regular lines for the transportation of such goods, foreign commerce will obviously be very greatly injured.

* * * * * * * *

Wherefore, in view of the premises, and as the jurisdiction of this cause vested in the Circuit Court only by reason of the difference of citizenship between the plaintiff and defendant, and as, therefore, the decision of the Circuit Court of Appeals is final except as the statute permits this Honorable Court to review the same by certiorari, petitioner prays that this Court will grant its writ of certiorari directed to the Circuit Court of Appeals for the Fifth Judicial Circuit, requiring that the record of said cause in said Court be certified to this Court and that this Honorable Court will, thereupon, proceed to correct the errors complained of and reverse the said judgment of the Circuit Court of Appeals and of the Circuit Court as of right of law should be done.

WILLIAM A. BLOUNT,
Attorney for Petitioner.

EXHIBIT A.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The case shows that the Louisville & Nashville Railroad Company is in the possession of a large wharf, built at its own expense on the extension of a public street in the city of Pensacola into the deep waters of the harbor of the city, on which street and wharf it has laid railroad tracks connecting with its main line and depot in the city, over which tracks the railroad company carries and transports goods ordered and intended for shipment by water, making a quasi terminal of said wharf; and the question is whether this wharf is a public wharf, or, if not public, but a private wharf, is it so located and used that the public has a right to have goods intended for shipment by water beyond Pensacola carried to said wharf, and have ships moored at said wharf, and there take on its said goods?

"Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner, or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure." Dutton v. Strong, 1 Black, 23, 32, 17 L. Ed. 29.

In the same case it is held that riparian proprietors have a right to erect bridge piers and landing places on the shores of navigable rivers, lakes, bays, and arms of the sea, if they conform to the regulations of the state, and do not obstruct the paramount right of navigation, but the right to make such erections terminates at the point of navigability. And of such improvements it is said that the riparian proprietor may construct any one of them for his own exclusive use and benefit; and, if not located in a harbor or other usual resting place for vessels, and if found within a shore of the

sea or the unnavigable waters of the lake which has not been used, or held out as intended to be used, by others, the public have no right to make use of the same.

The structure in this case is located in deep water, in a harbor where many ships lie at all seasons of the year; it was built, as shown by the plea, for the purpose of providing facilities for the transaction of such business as the railroad company might desire with such vessels as it might permit to come and lie by said wharf to take cargo; and it limits the use of the wharf to traffic handled by vessels in the regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to or consigned to the Gulf Transit Company (an agency of the railroad), and to traffic in connection with other vessels subject to special arrangement; in short, the use of the wharf is limited by the railroad company to vessels of connecting lines, and to such others as the company sees fit to permit.

In Indian River Steamboat Company v. East Coast Transportation Company, 28 Fla. 387, 10 South, 480, 29 Am. St. Rep. 258, where was involved questions very similar to those herein, the Supreme Court of Florida held:

"A railroad corporation, under the laws of Florida, has the right to erect and maintain docks, wharves, and piers, as incidents to its business, and to hold or dispose of them as may be deemed proper; but such corporation engaged in the business of common carrier has no right to lease the terminal point of its railroad track and terminal facility on a navigable stream to a steamboat company, and thereby defeat the ingress and egress to and from said railroad track on the part of other competing lines of steamboat companies."

And in the opinion said:

"The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian river by means of steamboats, rent from a railroad common carrier its dock on said river on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of delivering and receiving freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing busi-

ness with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this."

In Barrington v. Commercial Dock Company (Wash.) 45 Pac. 748, 33 L. R. A. 116, the right of a owner of a wharf located on the shore of Commencement Bay, in the city of Tacoma, where the water at the outer edge of the wharf was of the depth of eight feet low tide—the same situated on a waterway approachable from the sea and the waters of Puget Sound—and where certain vessels approved by the owner of the wharf, competing in business with other vessels, were permitted to land, to exclude certain other vessels in the same competing business, not approved by the wharf owner, was much considered, and the court said:

"The main contention of appellant is that its wharf is a private wharf, and under the control of the owner, and that it has a right to determine for itself with whom it will do business; and counsel confidently cites section 2136, Hill's Ann. St. & Codes, in support of this position. * * * The section, as a whole, while it recognizes the right of private ownership in wharfs, cannot be construed to mean that such private property may not be devoted to such use as will, in contemplation of law, make it partake of the nature of a public wharf. Upon this question it was said by the Supreme Court of the United States in Dutton v. Strong, 66 U. S. 32, 17 L. Ed. 32, that 'piers of landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner, or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure.' In Gould, Waters, § 119, the author lays down the proposition, and supports it by a great array of authorities, that, 'when wharves belonging to individuals

are legally thrown open to the use of the public, they become affected wth a public interest, and the wharfage must be reasonable.' The proof in this case shows that numerous steamers landed at appellant's wharf daily, discharging passengers and baggage, as well as freight, from different ports in the waters of Puget Sound and elsewhere; and it also shows that the appellant receives the sum of 25 cents per ton for every ton of freight going out or coming in over said wharf. We think that the language of the court in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, is applicable here, viz., that appellant stands 'in the very "gateway of commerce," and takes toll from all who pass.' In The Kate Tremaine, 5 Ben. 60, Fed. Cas. No. 7,622, it is said: 'A wharf is a necessity of modern navigation, and of navigation alone. The sole object of its erection is to facilitate the transportation of passengers and freight upon navigable waters. * * * Every vessel has a license to use, for her safety or convenience, any public wharf on navigable waters, upon paying reasonable wharfage.' We think that, in determining the character of appellant's wharf, regard should be had to the use to which it has been devoted, rather than its private ownership, and that, upon the facts found, the position of the appellant cannot be maintained. As well might the proprietor of a stagecoach claim the right to discriminate upon the ground that the property employed in his business was private property. The doctrine, if maintained, would tend to promote and further monopolies, which is not the policy of our law to favor."

The foregoing well-considered cases seem to furnish sufficient authority for holding that a wharf built out into the deep waters of a harbor like that of Pensacola, where ships coming from and going to all parts, land, lie, moor, and anchor for rest and loading and unloading, and which is used by the owner for his own business, and for such ships of others engaged in competing business as the owner may see fit to permit, is, by its location and use, open to all ships whose traffic calls them to take goods therefrom.

When the case goes further, and we consider that, in addition, the wharf is a quasi railroad terminal, where all goods, as ordered, are carried, and to which all consignees of goods ought to have access, the reasons are decidedly more potent for holding that such wharf, located in public waters which are free to all, is affected with a public use,

and cannot lawfully be farmed out to a small portion of the shipping public, to the encouragement of a monopoly and the hinderance of competition. And the monoply in the instant case at the wharf is not the only resulting evil. Controlling the wharf, as it claims the right to do, gives the railroad company the entire control at nearly all points on its line as to shipment of goods destined to water transportation beyond Pensacola, both as to route and rates.

The learned counsel for defendant in error has briefed a very plausible argument in favor of the right of the railroad company to discriminate against shippers and competing vessels for business at the wharf in question, and in favor of such competing vessels as it sees fit to permit, and, with much industry, has collated numerous authorities on the propositions submitted by him. On the proposition that a common carrier may hold itself out to the public as willing to serve it, and every member of it, just as far as it pleases, and its liability will be coextensive with such holding out, he cites Dickson v. Great Nothern Railway Co., L. R. 18 Q. B. Div. 176; Johnson v. Midland Railway Co., 4 Ex. 367; Hosea v. McCrory, 12 Ala. 349; Whitemore v. Steamboat Caroline, 20 Mo. 513; Lake Shore, etc., v. Perkins, 25 Mich. 329, 12 Am. Rep. 275. That a common carrier may devote portions of its facilities to its own use, or to the use of particular individuals, and thus refuse to be a common carrier as to those facilities: People v Railway Co,, 57 Ill. 437, and Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16, Fed. Cas. No. 2,730; Hutch. on Carriers, 75. Counsel also announces the proposition that one common carrier has no right, independent of charter or contract, to use the terminals of another carrier; citing Atchison, T. & S. F. R. Co. v. Denver & N. O. R. R., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; Gulf, Colorado & S. F. Ry. v. Miami Steamship Co., 30 C. C. A. 142, 86 Fed. 407, 416, 422; Little Rock & Memphis R. Co. v. St. Louis Ry. Co., 11 C. C. A. 417, 63 Fed. 775, 781; Little Rock & Memphis R. Co. v. St. Louis, I. M. & S. Ry. Co. (C. C.) 59 Fed. 404. Again, that a transportation company operating a railway and a line of steamboats connecting it at the company's wharf is not required by the third section of the interstate commerce act of February 4, 1887, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155,] to permit the boats of a competitor to land at such wharf: Ilwaca Ry. & Navigation Co. v. Oregon Short Line,

etc., 6 C. C. A. 495, 57 Fed. 673. Counsel also cites cases to numerous to mention as to the proposition that a railway company has a right to discriminate between draymen, hackmen, etc., desiring to use depot and like facilities of the railroad. These authorities are said to be collected in Donovan v. Pennsylvania Co. (C. C. A.) 120 Fed. 215. None of these propositions are, in our opinion, applicable to the present case, and the only one of the adjudged cases cited which seems to bear upon propositions here involved is Ilwaca Railway Co. v. Oregon Short Line, etc., supra. An examination of that case shows that the Oregon Short Line & Navigation Company controlled both the railway and the steamship line connecting with the wharf in question, and we find nothing decided therein to conflict with our views of the present case. If the wharf involved in this case, although in the deep waters of a navigable harbor, was used by the railroad company solely for its own carrying business in connection with its own lines, a different case would be presented; and we have herein quoted from Indian River v. East Coast Trans. Co., supra, to that effect.

As we hold to the views herein expressed, we are called on to reverse the judgment of the Circuit Court and remand the case, with instructions to sustain the demurrer to the third plea, and otherwise proceed according to law. And it is so ordered.

APPENDIX B.

U. S. CIRCUIT COURT COURT OF APPEALS.
FILED MARCH 29, 1904.

CHARLES H. LEDNUM,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS.
FIFTH CIRCUIT.

NOVEMBER TERM 1903.

No. 1323

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,

vs

THE WEST COAST NAVAL STORES COMPANY.

Error to the Circuit Court of the United States for the Northern District of Florida.

Before PARDEE, McCORMICK and SHELBY, Circuit Judges.

By the Court.

The questions involved on this writ of error were fully decided when this case was first before the court: see West Coast Naval Stores Company vs. Louisville & Nashville R. R. Co., 121 F. R. 645; and as we adhere to the views therein expressed, the judgment of the Circuit Court is AFFIRMED.

THE LOUISVILLE & NASHVILLE RAILROAD CO.

vs.

THE WEST COAST NAVAL STORES CO.

No. 1323.

This cause came on to be heard on the Transcript of the Record from the Circuit Court of the United States for the Northern District of Florida, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, Louisville & Nashville Railroad Company, and the sureties on the writ of error bond herein, F. C. Brent and Wm. H. Knowles, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

March 29, 1904.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

I, CHARLES H. LEDNUM, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing one page numbered from to , inclusive, contain a true copy of the opinion of the court and the final judgment, in the case of Louisville & Nashville Railroad Co., vs. West Coast Naval Stores Company, as the same remains upon the files and records of said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 30th day of March, A. D. 1904.

[SEAL.]

CHARLES H. LEDNUM,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

STATE OF FLORIDA,
COUNTY OF ESCAMBIA.

Wm. A. Blount being duly sworn says he is the counsel for the Louisville & Nashville Railroad Company, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

W. A. BLOUNT.

Sworn to and subscribed before me this 4th day of April, A. D., 1904.

E. H. ROSENSTEIN,
Notary Public.

[SEAL.]

My commission expires 8, 17, 1907.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1903.

L. & N. RAILROAD COMPANY, PETITIONER

vs.

WEST COAST NAVAL STORES COMPANY, RESPONDENT.

The respondent, the WEST COAST NAVAL STORES CO., is hereby notified that on Monday, the 18th day of April, A. D. 1904, during the motion hour of the Supreme Court of the United States, the petitioner, the L. & N. Railroad Company, will present to the said Court, in its court room, at the Capitol, in the City of Washington, D. C., a petition that it cause to be issued a writ of certiorari to the Circuit Court of Appeals, for the Fifth Judicial Circuit, requiring the said Circuit Court of Appeals to send up the record of the judgment in said cause, rendered March 29, A. D. 1904, in order that the same may be reviewed by the Supreme Court, in accordance with the law in such cases made and provided.

W. A. BLOUNT,
Attorney for Petitioner.

To J. C. Avery, Esq., Attorney for Respondent.

A copy hereof received this April 4, 1904.

JNO. C. AVERY,
Attorney for Respondent.